MATHAVAN A/L SHUNMUGAM

v.

WOO BEE LENG

HIGH COURT MALAYA, KUALA KANGSAR
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL APPEAL NO. 12-31 OF 1993 (T)]
28 DECEMBER 1994

TORT: *Conflicting versions of how accident occured - Damage to vehicles involved - No center white line - No glass fragments - Silent evidence - Plaintiff's motorcycle came out from minor road to major road - Duty of care on reaching junction - Trial Court found plaintiff wholly liable - Whether any misdirection by trial Court - Contributory negligence on part of defendant pleaded by plaintiff but not particularised - Whether fatal - Parties bound by own pleadings - Whether plaintiff in a running down case can depart from his pleadings.*

This was an appeal against the decision of the Sessions Court Judge Taiping in an action arising out of a collision between motorcycle No: ABL 7821 ridden by the plaintiff and motorcar No: AAR 3283 driven by the defendant. The trial Court gave judgment to the respondent/defendant and dismissed the applicant/plaintiff's claim with costs. Hence, this appeal by the plaintiff against the issue of liability.

Held:

[1] The decision of the trial Court which dismissed the appellant/plaintiff's claim was proper as from the printed evidence the trial Court's conclusion was justified.

[2] The trial Court rightly considered the question of contributory negligence on the respondent/defendant's part and rightly came to the conclusion that on the available evidence there was no contributory negligence.

[3] Though the appellant had pleaded contributory negligence in his statement of claim, yet the failure to particularise them would be fatal. It is as good as not pleading it at all.

[4] For the reasons adumbrated above, the appellant/plaintiff's appeal on the issue of liability is dismissed with costs.

[Appellant/plaintiff's appeal dismissed with costs].

Cases referred to:

Tay Kheng Hong v. Heap Moh Steamship Co. Ltd. [1964] MLJ 87 ***(refd)***
Fookes v. Slaytor [1979] 1 ALL ER 137 CA ***(refd)***

For the appellant/plaintiff - Kula Segaran; M/s. Kula & Associates.
For the respondent/defendant - Athithan; M/s. Chong & Poh.

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:

This is an appeal from the decision of the Judge of the Sessions Court, Taiping, Perak ("trial Court") in an action arising out of a collision between motorcycle ABL 7821 and motorcar AAR 3283. The motorcycle was ridden by the appellant/plaintiff, while the motorcar was driven by the respondent/defendant. The trial Court gave judgment to the respondent/defendant and dismissed the appellant/plaintiff's claim with costs. The trial Court also

proceeded to assess damages and, before me, both parties conceded that the damages assessed by the trial Court were correctly quantified and they are merely disputing as to the question of liability. Hence, this appeal merely revolves on the issue of liability.

There were two conflicting versions. The appellant/plaintiff alleged that he rode the motorcycle along the stretch of Jalan Elizabeth, Taiping, Perak on 11 October 1988 at about 12.25 p.m. following closely the respondent/defendant who was driving the motorcar. On approaching the junction of Jalan Elizabeth/Jalan Sultan, the appellant/plaintiff intended to and was turning to the right to Jalan Sultan and whilst in the process of doing so, the respondent/defendant suddenly and without warning turned to the right to negotiate the turning into Jalan Sultan. This sudden turning by the respondent/defendant resulted in a collision between both vehicles. The motorcycle collided into the rear right portion of the motorcar more towards and almost a fraction from the right rear bumper (see photograph B, p. 18 of the appeal record).

The respondent/defendant's version went like this. He was driving the motorcar along the main road of Jalan Elizabeth, Taiping at a speed of 60 kilometres per hour and upon reaching the Jalan Elizabeth/Jalan Sultan junction, he reduced his speed to 30 kilometres per hour. As the respondent/defendant reached that junction, a motorcycle suddenly shot out from the minor road of Jalan Sultan and rammed into the extreme right rear of his motorcar. The collision caused the motorcyclist and the motorcycle ridden by him to land right smack in the middle of Jalan Elizabeth (see the sketch plan at p. 16 of the appeal record). The respondent/defendant stopped his motorcar, alighted from it and hailed a passing vehicle to send the motorcyclist to the hospital.

From these two conflicting versions, the trial Court preferred the version of the respondent/defendant as being more probable and, in a careful judgment, set out the reasons for arriving at that decision. On perusal of the appeal record, the trial Court considered all the relevant and pertinent points before coming to that decision. I do not have any quarrel with the decision of the trial Court in putting the blame wholly on the shoulders of the appellant/plaintiff for the following reasons.

Firstly, applying the appellant/plaintiff's version, the damage to the motorcar should not be at the extreme right rear almost hitting the bumper because the motorcycle was already in the process of turning into Jalan Sultan and, it was at the juncture, that the appellant/plaintiff alleged that the motorcar also turned to the right in order to enter Jalan Sultan. In so doing, the front right portion of the motorcar should come into contact with the left rear portion of the motorcycle. But alas, the damage to the motorcycle was negligible more towards the front portion and from the photographs at p. 20 of the appeal record particularly photograph G, the front number plate of the motorcycle appears to be slightly off tangent. Photograph H at p. 20 of the appeal record which shows the rear portion of the motorcycle portrays a picture of perfect motorcycle - not a scratch of damage could be seen. In fact, the front and the rear lights of the motorcycle were still intact.

Secondly, there is no centre white line nor double white line along Jalan Elizabeth and it appears that this is the main road in relation to the location of the accident. Jalan Sultan is a minor road and there is a "Berhenti" sign on the left side of that road as one enters or about to enter Jalan Elizabeth. Thus, vehicles plying along Jalan Sultan and before entering Jalan Elizabeth must mandatorily stop at the junction of Jalan Sultan to give way to traffic on the main road. There was evidence that the appellant/plaintiff did not stop at the junction of Jalan Sultan before entering Jalan Elizabeth and using this as the barometer to show where

the appellant/plaintiff must have come from, the damage to the motorcar concentrated more to the extreme right rear side would, in the circumstances, be consistent with the version of the respondent/defendant.

Thirdly, no glass fragments were found on the road to show where exactly the collision took place. The trial Court rightly applied the silent evidence to come to the right conclusion that it was the appellant/plaintiff that was wholly liable.

I have read the appeal record several times and I could not find any misdirection by the trial Court on the available evidence. Consequently, I am not disposed to come to a different conclusion on the printed evidence as I do not have the advantage enjoyed by the trial Court of having seen and heard the witnesses. I am satisfied from the printed evidence that the trial Court's conclusions are justified having put to the forefront the question whether sitting without the privilege of the trial Court who heard and tried the case, could I come to the conclusion that the trial Court was plainly wrong? As I could not come to that conclusion, I have no choice but to affirm the decision of the trial Court.

There is another stronger ground for me to affirm the decision of the trial Court. It is this. Specific findings of fact were made by the trial Court to the following effect:

> Oleh yang demikian saya memutuskan sebagai satu fakta bahawa pada masa kemalangan berlaku plaintiff datang dari arah Jalan Sultan (dari atas ke bawah di dalam rajah kasar), tidak berhenti di simpang di mana ia patut berhenti lalu terus melanggar kereta defendan, di bahagian tepi kanan belakang. Oleh yang demikian saya memutuskan bahawa plaintif telah cuai di dalam menunggang motosikalnya.

The principles on which an appellate Court may interfere with a lower Court's findings of fact can be found in the passages in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] MLJ 87. His Lordship in that case said:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a Judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 ALL ER 582 at p. 587:
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> (i) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.
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> (ii) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> (iii) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.

The trial Court in the instant appeal did not, in the course of analysing the evidence, go against the principles enunciated by Lord Thankerton as stated above.

But that is not the end of the matter. The learned Counsel for the appellant/plaintiff argued that the trial Court ought to consider the question of contributory negligence on the respondent/defendant's part and make an order to that effect. On this point, I must examine the statement of claim filed by the appellant/plaintiff. Paragraph 1 of the statement of claim referred to the contributory negligence by the respondent/defendant in driving the motorcar

but it did not specify the particulars of the contributory negligence. In the course of the trial before the trial Court, there was no attempt made by the appellant/plaintiff through his Counsel to amend the statement of claim by particularising the contributory negligence alleged to be committed by the respondent/defendant. It is now trite law that each party is bound by his own pleadings and cannot be allowed to raise an issue without due amendment. This rule enables each party to know the case he has to meet and cannot be taken by surprise. I might as well add that the Courts too are bound by the pleadings in much the same way as the parties themselves. There is however a dearth of authorities for the proposition that a plaintiff in a running down case can depart from his pleadings at the hearing **provided** the defendant is not taken by surprise. In the present appeal, the trial Court rightly considered the question of contributory negligence on the respondent/defendant's part and came to the conclusion that on the available evidence there was no contributory negligence as the respondent/defendant had sufficiently reduced his speed on approaching the junction of Jalan Elizabeth/Jalan Sultan and it was the appellant/plaintiff that was solely negligent in not stopping at the junction of Jalan Sultan before entering the main road of Jalan Elizabeth.

In my judgment, though the appellant/plaintiff had pleaded contributory negligence in his statement of claim, yet the failure to particularise them would be fatal. It is as good as not pleading it at all (see *Fookes v. Slaytor* [1979] 1 ALL ER 137 CA for comparison where it was held that the defence of contributory negligence was only available if it was pleaded and that, in the absence of a pleading by the defendant of contributory negligence, the Judge had no jurisdiction to make a finding of such negligence on the part of the plaintiff).

For the reasons adumbrated above, I dismissed the appellant/plaintiff's appeal on the issue of liability with costs. I affirmed the decision of the trial Court in regard to the quantum of damages.